STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Wayne Underwood,)	
)	
-VS-)	
Illinois Bell Telephone Company)	
d/b/a SBC)	
d/b/a AT&T Illinois)	
)	Docket No. 14-0301
Petition for a Declaratory Ruling that)	
late fee collections during the period)	
7/1/2002-2/28/2010 violated Illinois)	
Administrative Code Section 735.160(a))	
and should be refunded to customers	Ś	

REPLY BRIEF OF AT&T ILLINOIS IN SUPPORT OF VERIFIED SECTION 2-619.1 MOTION TO DISMISS PETITION FOR DECLARATORY RULING

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INTRODUCTION

The Petition in this case is an example of overreaching at its worst. It seeks an unprecedented mass "refund" of *all* late-payment charges assessed by AT&T Illinois over an 8-year period from July 2002 through February 2010, a windfall of over \$125 million. The asserted factual basis for this extraordinary result is less than razor-thin. Because AT&T Illinois prepared all its bills for mailing itself (using a "manifest" process the U.S. Postal Service authorizes and encourages) the Postal Service did not place an official U.S. postmark on the envelopes. Instead, AT&T Illinois itself placed a "dated mark" on each bill showing the date by which it was mailed.

As is clear from Petitioner's opposition brief, there is no dispute that all the "dated marks" were correct. There is no dispute that AT&T Illinois gave customers at least 21 days between the mailing date and due date of every bill. There is no contention that AT&T Illinois' use of its own "dated mark," in lieu of an official U.S. postmark, caused Petitioner – or anyone else, for that matter – to pay any bill late. In other words, if the Postal Service had placed an official U.S. postmark on every bill, Petitioner concedes it would not have made one bit of difference. The same customers would have paid late, for the same reasons (like forgetting or losing their phone bill), and paid the same late fees.

The asserted *legal* basis for Petitioner's theory that the absence of an official U.S. postmark is an automatic "get out of late charges free card" is even thinner. Petitioner twists Section 735.160(a) of the Administrative Code (as it was written before clarification effective March 2010) into an absolute requirement that all phone bills *had* to have an official U.S. postmark. Otherwise, Petitioner claims, the utility could not charge late-payment fees in *any* circumstance – no matter why the customers paid late or how long (even years) they delayed payment. The regulation's language refutes that theory. Not surprisingly, then, neither the

Commission nor any court has ever adopted Petitioner's radical view, despite numerous failed requests by Petitioner's counsel for such a ruling in previous cases. Before this latest iteration, Petitioner's counsel Mr. Krislov has pressed his theory without success 18 times: in the Commission (4 times), the Circuit Court of Cook County (3 times), the Appellate Court (6 times) and the Illinois Supreme Court (5 times). Petitioner cannot offer any authority from *any* jurisdiction adopting his theory in *any* context.

While the Petition's substantive theory lacks merit, its more fundamental defect is that the Commission lacks authority to entertain it. Petitioner seeks reparations under Section 9-252 even though the statute's mandatory two-year deadline for reparations claims came and went years ago.

Lacking a factual, legal or jurisdictional foothold for his extraordinary request, Petitioner tries to fabricate a concession by AT&T Illinois. Petitioner claims that AT&T Illinois "does not deny that its conduct violated Section 735.160(a) . . . nor that it was intentional." Pet. Br 1. That is absolutely, categorically, unequivocally false. AT&T Illinois' opening brief demonstrated at length that its mailing practice was and is fully consistent with Section 735.160(a). AT&T Br. 16-20. That is one reason (among several) why AT&T Illinois has moved to dismiss the Petition. AT&T Illinois' only "intentional" acts were: (i) implementing a modern, efficient mailing procedure that is authorized by the Postal Service, after this Commission's staff advised it in 2002 that no waiver of Section 735.160 was needed and after the Ohio commission likewise ruled that the procedure "is reasonable and fulfills the purpose of" its analogous rule (AT&T Br. 5, 18-19); (ii) implementing process controls to ensure that all bills were mailed at least 21 days before the due date (AT&T Br. 4); and (iii) assessing charges for late payments as it was authorized to do by its tariffs and legally required to do by 220 ILCS 5/9-240 (AT&T Br. 12-13 & Staff Br. 7).

The mass refund sought by Petitioner is not a "just conclusion" in any way, shape or form. Pet. Br. 7. It is a patently unlawful result. Staff agrees that the Petition should be dismissed on multiple grounds. The Commission should dismiss the Petition.

ARGUMENT

I. Section 2-619 Motion To Dismiss

A. The Petition Is Barred By Section 9-252's Two-Year Statute Of Limitations.

1. The Statute's Plain Language Is Dispositive.

Petitioner does not dispute that this action is in essence a complaint for reparations under Section 9-252. Nor can he, because that is exactly what the Appellate Court held when it affirmed the dismissal of the circuit court complaint (originally filed by Samuel Cahnman) that Petitioner attempted to join in January 2011. AT&T Br. 8 & Ex. 16 ¶ 25. In addition, there is and can be no dispute that Section 9-252 contains an unambiguous two-year time limit for such complaints. "All complaints for the recovery of damages shall be filed with the Commission within 2 years from the time the . . . service as to which complaint is made was furnished or performed." 220 ILCS 5/9-252. And of course there is and can be no dispute that the charges Petitioner seeks to contest fall well outside the 2-year statutory window. The Petition seeks to challenge late-payment charges that were assessed from July 2002 through February 2010 (Petition ¶ 17), and those charges were 4 to 12 years old when the instant Petition was filed. AT&T Br. 9-12. Indeed, the very caption of this case states that the charges were "collected during the period 7/1/2002-2/28/2010."

Staff correctly recognizes that Petitioner "failed to bring the claim at issue to the Commission in a timely manner" because the contested charges are "clearly beyond the two year timeframe specified within the statute." Staff Br. 11. Thus, Staff rightly concludes that "the

applicable statutory provision and legal precedent require that the Commission dismiss the complaint." *Id.* at 12.

Petitioner does not address the statutory deadline until the very end of his brief, and even then all Petitioner can muster is a 3-sentence throwaway about "tolling" the statute. Petitioner cites one case, *Williams v. Board of Review*, 241 Ill. 2d 352 (2011), for the sweeping claim that "the Illinois Supreme Court has already ruled that equitable tolling applies to statutes of limitations that govern administrative agency procedures." Pet. Br. 7-8.

Petitioner grossly overstates *Williams*. In that case, the Supreme Court recognized that equitable tolling applies to *some* limitations periods, if three conditions are met: *if* the relevant statute is "nonjurisdictional," *if* the relevant administrative agency "has not answered the question of whether equitable tolling can apply," and *if* the statutory language permits tolling. 24 III. 2d at 361, 364. The Court decided that all three conditions were satisfied in the specific context of a deadline set by federal law for persons seeking certain benefits under the federal Trade Act to enroll in federal training programs. *Id*. at 370. The Court did not say that equitable tolling applies to *all* statutory deadlines for agency actions (as Petitioner blithely suggests) and it certainly did not say that tolling applied to the two-year bar for the reparations claim Petitioner seeks to bring before the Commission. Despite invoking *Williams*, Petitioner makes no attempt whatsoever to satisfy any of the conditions described in *Williams*, and no attempt to show why tolling would apply under the Illinois statute at issue here, Section 9-252.

And of course, he cannot. This case is the polar opposite of *Williams*. Unlike *Williams*, the relevant agency – this Commission – has already "answered the question of whether tolling can apply" to reparations claims, and its answer is squarely "No." See *Patel v. Commonwealth Edison Co.*, Docket No. 98-0208, 1999 WL 33915149, at 3 (ICC Nov. 17, 1999) ("To the extent that [customer] is heard to assert that her timely filing in the Circuit Court tolled the statutory

period she is wrong."); *Kumaran v. Illinois Bell Tel. Co.*, Docket No. 92-0296, 1994 WL 16778971, at 1 (ICC Oct. 5, 1994) ("There is no automatic tolling of the two-year limitations period while a complainant pursues another legal remedy.").

Moreover, unlike the "nonjurisdictional" federal trade statute in *Williams*, the Commission has decided that Section 9-252 *is* jurisdictional and therefore does not permit tolling. As the Commission has explained, Section 9-252 controls the "statutory authority for the Commission to entertain" a reparations claim; thus, once the two-year period expires, "this Commission does not have jurisdiction to entertain" reparations claims. *King's Walk Condominium Ass'n v. Commonwealth Edison Co.*, Docket No. 08-0264, 2011 WL 3796787, at 8, 12 (ICC Interim Order, July 27, 2011). As the Commission has held, "[t]here is simply no authority in the Public Utilities Act for the Commission to either waive or modify the limitations period" (*Kumaran*, 1994 WL 16778971, at 1) and "neither Section 9-252 nor Section 9-252.1 provides the Commission with authority to extend the statute of limitations" (*Stevens v. Ameren Illinois Co.*, Docket No. 10-0651, 2011 WL 2541901, at 3 (ICC June 22, 2011)).

Petitioner makes no attempt to address the Commission's repeated holdings. Staff correctly concludes that "Petitioner has not . . . provided any legal support" for tolling the statute. Staff Br. 12. Staff appreciates that "[t]he Commission has addressed this question [of tolling] in the past" and that the Commission has held that the statute "does not provide for the tolling of the claim where it may have been filed in another venue." *Id.* at 11.

2. Petitioner's "Shell Game" Rhetoric Is Irrelevant And Baseless.

Because Section 9-252 and Commission precedents are dispositive, Petitioner tries diverting the Commission with a baseless, irrelevant attack on AT&T Illinois. Petitioner accuses AT&T Illinois of a "shell game" strategy by seeking dismissal here after obtaining dismissal of his circuit court action. Pet. Br. 7.

Contrary to Petitioner's rhetoric, AT&T Illinois' position here is fully consistent with its position in the courts. AT&T Illinois contended in the courts, and maintains here, that Petitioner's claim is in essence a Section 9-252 reparations claim. Section 9-252 makes the Commission the proper (and only) forum for Petitioner to bring such claims, so the courts correctly dismissed Petitioner's attempt to proceed. But in addition to specifying the Commission as the proper forum, Section 9-252 also controls the *time* for bringing reparations claims. The statutory window was open for ample time: from July 2002 (when the disputed charges began) to March 2012 (two years after the last of the disputed charges). Further, this Commission expressly told Petitioner's counsel Mr. Krislov in 2006 that it could entertain reparations claims by "[n]on-class members" who were not bound by the 1994 settlement that enjoined Krislov and other class members from bringing postmark claims. AT&T Br. Ex. 5 at 7. Eight years have passed, and now the statutory window has closed – not because of anything AT&T Illinois did, but because (i) Petitioner failed to raise any dispute about AT&T Illinois' charges until January 2011, when he tried to intervene in the circuit court suit brought by Mr. Cahnman, and (ii) Petitioner then spent three years in a fruitless attempt to evade the Commission's jurisdiction and proceed in the courts. Throughout, all AT&T Illinois has done is ask the courts, and now the Commission, to enforce Section 9-252 and long-settled precedent.

Petitioner's rhetorical attack is not only baseless but irrelevant, because the statutory time limit is jurisdictional and dispositive. Krislov tried the same tactic when AT&T Illinois moved to dismiss his own complaint in 2006, arguing that AT&T Illinois had taken an inconsistent position before the circuit court. The Commission rejected his argument because (i) Krislov "cite[d] no law in support of this argument"; (ii) AT&T Illinois' position in the Commission was not contrary to its position in the courts; and (iii) in any event, "this Commission's jurisdiction is defined by statute, not by the parties' assertions." AT&T Br. Ex. 5 at 9.

The Commission should likewise reject Petitioner's accusations here. As AT&T Illinois has shown, Section 9-252 and this Commission's precedents require dismissal. AT&T Illinois is not alone: Staff properly recognizes that "the applicable statutory provision and legal precedent require that the Commission dismiss the complaint because it was not filed within the [Act's] two year statute of limitations." Staff Br. 12.

B. The Petition Is Also Barred By The Filed Tariff Doctrine.

As Staff recognizes (Br. 7), Petitioner does not dispute that AT&T Illinois complied fully with its filed tariffs when it assessed all of the late-payment charges he now seeks to dispute. During the period at issue, AT&T Illinois' tariffs provided that "[b]ills are due on the due date shown on the bill" and that "[a] late payment charge . . . **shall apply** to amounts shown on a monthly bill which remain unpaid after the due date." AT&T Br. Ex. 20 §§ 11.3, 12.1 (emphasis added). Petitioner claims that the tariff "does not address" the situation in which a bill does not have an official U.S. postmark (Pet. Br. 3), but that is precisely AT&T Illinois' point. The tariff requires a charge on all late payments with no exception based on the presence or absence of an official U.S. postmark.

Petitioner has it exactly backwards in characterizing the issue presented by the filed tariff doctrine to be whether the tariff "should overrule" Section 735.160. Pet. Br. 3. Just the opposite. The real question is whether the Commission should construe Section 735.160 to overrule the tariffs – which, Staff observes, have the force of law and are backed by statute – and require a retroactive refund of tariffed charges years after the fact. The answer is compelled by the regulation's plain language. Section 735.160 did not purport to prohibit the imposition of late-payment charges in any circumstances, nor did it purport to require refunds of tariffed late-payment charges in any circumstances.

Petitioner is equally wrong in claiming that "it was only by complying with Section 735.160, that the company had any authority to impose and collect a late charge." Pet. Br. 3. By its plain terms, Section 735.160 does not purport to establish *all* the circumstances in which late charges may be assessed. That is the function served by each utility's tariffs. Within the tariff framework, Section 735.160 is a "safe harbor" that defines some time frames in which utilities "may" assess late-payment charges with assurance that those time frames cannot be challenged. But it does not purport to govern all circumstances for late-payment charges, nor to rule out the assessment of such charges in any other circumstances. It simply leaves such circumstances to be defined by the tariffs.

C. The Petition Improperly Seeks To Bypass The Prior Settlement Agreement And Two Prior Judgments.

The Petition improperly seeks reparations not only for Petitioner himself, but also for all other customers that paid late-payment charges – including customers who released and are "permanently enjoined" from bringing such claims under a 1994 Settlement Agreement. Thus, the Petition violates (i) the Settlement Agreement, (ii) this Commission's order enforcing the Agreement and dismissing the 2006 complaint filed by Petitioner's counsel Mr. Krislov, (iii) the Appellate Court's order affirming that dismissal, and (iv) the judgment of the Circuit Court and Appellate Court holding that class members were not entitled to a refund under the Settlement Agreement. AT&T Br. 14-16.

Petitioner asserts "that the 1993 Settlement does not preclude this Commission from order[ing] Bell" to issue reparations to members of the settlement class, but offers no explanation or legal authority. Pet. Br. 4. Instead, he says the Commission should simply ignore the legal bars to his Petition until some unspecified "later" time. *Id*.

As the other sections of this brief demonstrate, there is no "later." There are multiple reasons why the Petition must be dismissed in its entirety now. In any event, where a Petition seeks to pursue claims that are barred by law, those claims should be dismissed even if others could survive. The Commission cannot simply ignore those legal bars or allow "permanently enjoined" claims to proceed.

II. Section 2-615 Motion To Dismiss

A. The Petition Misreads The Commission's Regulation In An Attempt To Punish Modern Mailing Methods And Reach A Patently Absurd Result.

The Petition rests on an arbitrary, radical, and baseless misreading of Section 735.160(a) of the Commission's regulations. Before the Commission clarified that regulation in March 2010, Section 735.160(a) stated that "[t]he due date printed on the monthly bill may not be less than twenty-one days after the date of the postmark on the bill, if mailed, or the date of delivery as shown on the bill if delivered by other means." Petitioner takes the word "postmark" out of context and transforms the regulation into an absolute "postmark requirement" (Pet. Br. 6) that all bills *had* to bear an official postmark from the Postal Service, and that a utility could *never* assess late-payment charges on bills that did not bear an official U.S. postmark.

The Commission has never adopted Petitioner's radical construction or endorsed his draconian penalty. To the contrary, after recognizing "the current realities of bill mailing in the industry" the Commission did not order reparations but clarified its regulations to make clear that an official postmark was not required. AT&T Br. Ex. 8 at 1, 3. Petitioner tries to dismiss the March 2010 clarifications, claiming they "simply have no effect on . . . the version of Section 735.160(a) that was in effect prior to March 2010." Pet. Br. 5. But Petitioner ignores the language and history of the Commission's orders. Before the 2010 clarification, the Commission had been well aware of AT&T Illinois' mailing practices and of Mr. Krislov's views about

Section 735.160, since at least 2006 (when Mr. Krislov filed his unsuccessful complaint). AT&T Br. Ex. 5. Yet despite recognizing its authority to enforce the regulation (*id.* at 7), the Commission chose to clarify the regulation rather than to penalize AT&T Illinois or the many other carriers that employ modern mailing methods.

Further, although the Commission changed the *wording* of Section 735.160, it did not say that it was changing the regulation's *meaning* or *effect*. To the contrary, it endorsed the Staff Report, which makes clear that the revisions in language were intended as a clarification of law, not a change in law. In Staff's words, the revisions would simply "make it clear that carriers need not have a USPS dated postmark affixed to the exterior of bills," and Staff recommended them "in the interests of clarity." AT&T Br. Ex. 8 at 2-3 & Ex. 10 at 1. "[W]hen an amendment merely clarifies existing law," it "will be applied retroactively." *Royal Imperial Group, Inc. v. Joseph Blumberg & Assocs.*, 240 Ill. App. 3d 360, 364-65 (1st Dist. 1992).

Just as the Commission has never adopted Petitioner's theory, Petitioner does not cite any court, commission, or other authority in any jurisdiction that has adopted his extreme view of postmarks in *any* context. To the contrary, as AT&T Illinois showed in its opening brief, the Ohio commission rejected that extreme view when it construed a regulation on late-payment fees that made the same reference to "postmarks." AT&T Br. 18. The commission held that the same bill-mailing process that Petitioner seeks to challenge here "is reasonable and fulfills the purpose of the rule," notwithstanding the absence of an official U.S. postmark. *In re Minimum Telephone Service Standards*, 2002 WL 31716548, at *2 ¶ 4 (Ohio Pub. Util. Comm'n Oct. 3,

There is no basis for Petitioner's assertion that Staff "recognized that Bell's practices did not comply with the Code provision as it was" worded before the clarification. Pet. Br. 5. Staff's "view" was that "the absence of a dated USPS postmark . . . does *not* necessarily mean that a bill due date fails to comply with Section 735.160(a)." AT&T Br. Ex. 8 at 2 (emphasis added).

2002). AT&T Illinois has shown that the same reasoning controls here, and Petitioner simply ignores that decision and the other supporting authorities AT&T Illinois provided.

Petitioner offers three arguments about the regulation, but none of them bears any fruit. First, Petitioner cites an internal e-mail ostensibly written by a Commission attorney, which recognized that "[t]here does not appear to be a requirement that there be a postmark" in the regulation, and then posed the rhetorical question "I don't know how they can set a past due date if there is no postmark." Pet. Br. 5 & Ex. 1.² The e-mail's musing contains no analysis of the regulation and reaches no conclusion. More fundamentally, internal e-mails are not legal authority, and the Commission's in-house attorneys are not Commissioners. The e-mail is not even evidence. At most, it is hearsay.

Equally unavailing is Petitioner's citation to *People v. Hansen*, 2011 IL App (2d) 081226. Indeed, *Hansen* refutes Petitioner's extreme position. *Hansen* considered Illinois Supreme Court Rule 373 (which governs the time for appellate filings) and Rule 12(b)(3) (which requires that "[p]roof of mailing *shall* be" evidenced by the attorney's certificate or by an affidavit). The appellant's filing did not contain a certificate or an affidavit as stated by the rules, but the court decided the filing was still timely because it was postmarked before the due date. 2011 IL App (2d) 081226, ¶¶ 13-15. While *Hansen* found the postmark to be *acceptable* proof of the mailing date, it did not say that the postmark was the *exclusive* means to prove the mailing date (as Petitioner claims here). More importantly, the Court did not take Petitioner's absolutist view of any mailing method. Under a rigid view of Rule 12(b)(3), a postmark would have been unacceptable because the Rule required proof of mailing by certificate or affidavit, and did not

² As discussed below, the answer to that question is that since AT&T Illinois itself prepared all the bills for mailing (with the authorization of the Postal Service), AT&T Illinois itself placed the mailing date and due date on each bill. There is no dispute that all the mailing dates were accurate, and that there was at least 21 days between the mailing date and due date.

mention postmarks. The Appellate Court, however, found that view "too literal and narrow," because the rules were "not written to compel courts to disregard clear evidence . . . of the timely mailing of a document." Id. ¶ 13.

Likewise, nothing in Section 735.160(a) compels the Commission to disregard clear – and in this case, uncontroverted – evidence of the timely mailing of AT&T Illinois' bills. Petitioner does not dispute that every AT&T Illinois bill accurately stated its due date and the date by which it was mailed. Petitioner also does not dispute that AT&T Illinois gave customers at least 21 days between the mailing date and due date. Indeed, as AT&T Illinois showed in its opening brief, AT&T Illinois' systems are designed to prevent it from even printing a bill for mailing if there is less than 21 days before the due date. AT&T Br. 4.

Section 735.160(a) did not require the "disgorgement" of late-payment charges on bills where timely mailing is documented by a "dated mark" placed by the utility. The regulation used the *date* of a postmark as a measuring stick to show a 21-day interval between mailing and due dates. But it did not say that a postmark is absolutely required for all bills and did not purport to preclude utilities from documenting timely mailing through other means. Moreover, Section 735.160(d) stated that utilities "may" assess late fees on bills that comply with the regulation, but did not *prohibit* utilities from assessing late fees in any circumstance, and in particular did not prohibit the assessment of late fees based solely on the absence of an official U.S. postmark. To the contrary, Section 735.160's permissive terms are even *more* flexible than the rule at issue in *Hansen*, which required that proof of mailing "shall be" by certificate or affidavit. *A fortiori*, then, *Hansen*'s rejection of an unduly "literal and narrow" approach to Rule 12(b)(3) applies with even more force to Section 735.160.

With no legal authority on his side, Petitioner resorts to speculation about the "reason" for the asserted "postmark requirement." Pet. Br. 6. According to Petitioner, the regulation was

intended "to eliminate having to rely on the telephone company's unsworn word that it gave people at least 21 days from mailing." *Id.* But Petitioner's speculation is just that: speculation. Petitioner offers absolutely no evidence or authority, either from regulatory history or any Commission order or court decision, that the Commission actually intended to use the word "postmark" for the reason he posits. If it had, the regulation would have said "All bills sent by mail must bear an official U.S. postmark." Of course, the regulation never said that.

More fundamentally, Petitioner's speculation about the intent of the alleged "postmark requirement" proceeds from an unfounded premise, because Section 735.160(a) did not contain a "postmark requirement." Nowhere did the regulation say that postmarks were required on any bill (a requirement that would be manifestly unfair, given that utilities have no control over the Postal Service's actions) and nowhere did it prohibit utilities from assessing late-payment charges in any circumstance. The manifest intent of Section 735.160 as a whole was to establish a safe harbor – a period of time (21 days) from the delivery date of a bill that would always be sufficient for the imposition of late-payment charges. Within that framework, Section 735.160(a) simply makes clear that if the bill is sent by mail, the mailing date is considered the delivery date (just like the well-known "mailbox rule" for court filings). The "date of the postmark" is simply a way to show the mailing date, because postmarking was "a customary mailing practice that" was "implicitly contemplated" when the regulation was promulgated (as the Ohio commission realized with respect to the reference to the postmark date in its own rules). See *Minimum Telephone Service Standards*, 2002 WL 31716548, at *2 ¶ 4.

As the Supreme Court has explained, the modern policy of equating the mailing date with the delivery date assures parties using the mail that they do not have to make sure that the documents are timely delivered. See *Harrisburg-Raleigh Airport Auth. v. Department of Revenue*, 126 Ill. 2d 326, 341 (1989). This makes sense, because any delays in delivery are not

within the mailing party's control and are instead within the control of the Postal Service. Similarly, it would make no sense to punish utilities for the absence of an official U.S. postmark, because postmarking is the responsibility of the Postal Service. In particular, Petitioner offers no evidence or authority that the Commission intended to punish utilities and grant a windfall to late-paying customers under the circumstances presented here, where (i) the Postal Service itself authorizes and encourages the utility to prepare its own bills for mailing, (ii) there is no dispute that the utility correctly stated the date of mailing on each bill, and (iii) there is no dispute that the utility gave customers at least 21 days between the mailing date and due date of every bill.³

B. The Petition Also Violates The Commission's Procedural Rules.

1. The Petition Does Not Comply With The Rules For Declaratory Relief.

The Petition is styled as a request for a declaratory ruling. AT&T Illinois' opening brief demonstrates that the Petition does not comply with the Commission's rule for such requests, 83 Ill. Admin. Code § 200.220. The Petition does not seek a ruling on the "applicability" of any existing "rule" to "the person requesting a declaratory ruling" going forward, as the rule requires. *Id.* Rather, the Petition seeks a decision that *past* actions by a party *other* than the Petitioner (that is, AT&T Illinois) violated a regulation as it was worded in the past. AT&T Br. 21-22.

Staff agrees that the Petition "seeks relief beyond the scope of the declaratory ruling regulation." Staff Br. 8. Further, Staff agrees that the Commission should not "issue a

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Petitioner wrongly describes late-payment charges as a "penalty" that is separate from the price of the actual service. Pet. Br. 7. This Commission has long recognized that late-payment charges serve the "legitimate function" of "charg[ing] the costs imposed on the utility by late payers to those same late payers." Ex. A hereto (Sept. 21, 1983 Order, Docket No. 82-0591), at 2. Conversely it would be "manifestly unfair to require a customer who pays a bill promptly each time to stand any of the expense" required for the utility "to collect his neighbor's bill who allows it to become delinquent." *Id.* Thus, "such a charge is properly included *in the rates for service.*" *Id.* at 3 (emphasis added). See also *Kiefer v. Paging Network, Inc.*, 50 F. Supp. 2d 681, 685 (E.D. Mich. 1999) ("The late payment charge at issue here is part of the overall rate structure for paging services").

declaration regarding a version of a rule that is four years out of date" and that "[d]eclaratory relief should be therefore denied." *Id.* at 10.

Petitioner offers no response, and therefore concedes that the declaration he seeks is improper. While that concession is dispositive, it is worth noting that after AT&T Illinois filed its opening brief, the Appellate Court held that the Commission does not even have jurisdiction to enter a declaratory ruling when the conduct at issue occurred in the past, and when there is no evidence that the issue will come up again any time soon. *Securus Technologies, Inc. v. Illinois Commerce Comm'n*, 2014 IL App (1st) 131716, ¶¶ 39-40, 47 (because petitioner "sought a ruling regarding a course of action [the regulated utility] had already undertaken," the Commission's declaration "was outside the Commission's authority under the Administrative Procedure Act and the Commission's own implementing regulation" and "must be vacated"). Likewise, the Petition here seeks a declaration regarding conduct that occurred in the past and there is no chance that the issue will come up again any time soon because the regulation on which the Petition relies has been clarified.

2. The Petition Violates The Commission's Rule Prohibiting Class Actions.

As AT&T Illinois showed in its opening brief, the Petition is in essence a class action, and is therefore contrary to Rule 200.95, which commands that "Class Actions" are "Prohibited." AT&T Br. 22. Staff agrees that "the Commission may not entertain class actions such as the one at issue here" and that "this action is, in substance, a class action barred by Commission rules." Staff Br. 4, 5.

Petitioner does not dispute that his action is in substance a class action, and does not dispute that the Commission cannot entertain class actions. Instead, Petitioner tries to duck the issue, claiming that the Commission can simply order a mass refund to all customers based

solely on his own Petition "without the need to certify the case as a class action." Pet. Br. 4. Petitioner cites two cases, but neither one supports his argument and neither supports the imposition of a "class" refund under Section 9-252 or any other statute. To the contrary, both cases concern the equitable power of reviewing courts to authorize refunds after a Commission rate order has been reversed on appeal. See People ex rel. Hartigan v. Illinois Commerce Comm'n, 148 III. 2d 348, 397-98 (1992) (upon reversal of rate order, circuit court properly ordered refund as "an equitable remedy made available to ratepayers pursuant to this court's equitable powers"); Commonwealth Edison Co. v. Illinois Commerce Comm'n, 2013 IL App. (2d) 120334, ¶ 50 (Appellate Court's remand order authorized Commission to issue refund, not pursuant to statute but under the *Court's* "inherent equitable power," because "[t]he Commission was acting with our authorization") (emphasis added). Hartigan expressly stated that the judicial refunds in the rate-case context are "not a statutorily based remedy" and in particular are not reparations under Section 9-252. Hartigan, 148 Ill. 2d at 398. "The Commission, once it approved the [rate increase], cannot now require [the utility] to pay reparations for those rates." Id. at 396. Obviously, this case does not involve a court's equitable power to issue refunds in an appeal from a Commission rate order (and as Staff points out, Staff Br. 5-7, the Commission does not have equitable powers of its own). Rather, it is a reparations case under Section 9-252, and is subject to the Commission's prohibition of class actions. Petitioner offers no authority to support the imposition of reparations on a *class* basis on the facts presented here.

CONCLUSION

For the reasons set forth above and in its opening brief, AT&T Illinois respectfully requests that the Commission dismiss the Petition.

Respectfully submitted,

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